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# In the Supreme Court of the United States

**October Term, 1984**

BURGER KING CORPORATION,
a Florida Corporation,
*Appellant,*

vs.

JOHN RUDZEWICZ,
*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

## BRIEF OF APPELLANT

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## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1254(2) BECAUSE THE CIRCUIT COURT HELD THAT §48.193(1)(g) OF THE FLORIDA STATUTES—WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA—IS UNCONSTITUTIONAL AS APPLIED.

2. WHETHER THE CIRCUIT COURT ERRED IN HOLDING UNCONSTITUTIONAL, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT DUE-PROCESS CLAUSE, §48.193(1)(g) OF THE FLORIDA STATUTES, WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA.

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H. Brown, *Franchising Realities and Remedies* (1978) .....11, 12, 34, 35
R. Dias and S. Gurnick, *Franchising, the Investor's Complete Handbook* 15-16, 21 (1969) ..... 12
R. Metz, *Franchising: How to Select a Business of Your Own* 11-12 (1969) ..... 12
2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 4.02[3] (1982) ..... 33
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MacNeil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978) ..... 20, 21

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von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966) ..... 37, 39, 43, 44

Note, *Long-arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?*, 61 B. U. L. Rev. 375 (1981) ..... 27, 33, 34

## OPINION BELOW

The opinion of the circuit court is reported as *Burger King Corporation v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), and appears in the Joint Appendix at J.A. 166.[1] The district court's Findings of Fact and Conclusions of Law and Order thereon appear at J.A. 152, the Final Judgment at J.A. 164; neither are reported.

## JURISDICTION

This was an action growing out of a franchise relationship, and the district court's jurisdiction was invoked on the basis of diversity of citizenship under 28 U.S.C. §1332; as well as federal-question jurisdiction under the federal trademark laws, *see* 18 U.S.C. §1121 and 28 U.S.C. §1338 (J.A. 120). The decision and opinion of the circuit court were entered on February 13, 1984 (J.A. 166). A timely petition for rehearing and suggestion for rehearing en banc were entertained and denied on March 22 (J.A. 186). The circuit court's judgment issued May 7 (J.A. 188). The notice of appeal was filed in the circuit court on May 21, 1984 (A. 41), within 90 days of that court's denial of rehearing. Invoking this Court's jurisdiction under 28 U.S.C. §1254(2), the appeal was docketed on June 19, 1984, within the same 90 days. In an order dated October 1, 1984, this Court postponed further consideration of the question of jurisdiction until a hearing on the merits.

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1. "J.A." refers to the Joint Appendix. "A." refers to the Appendix to the Jurisdictional Statement. "R." refers to the Record on Appeal in the circuit court. "Tr." refers to Volumes V-VII of the Record on Appeal--consisting of the separately-paginated transcript of the trial in this case. "X." refers to trial exhibits. The appellee's co-defendant at the trial, Brian MacShara, did not appeal the judgment of the district court, *see* J.A. 168 n.1, and is not a party to this proceeding. There are no parties other than Mr. Rudzewicz and Burger King Corporation—a wholly-owned subsidiary of the Pillsbury Company.

## CONSTITUTIONAL PROVISION AND FLORIDA STATUTE

*Fourteenth Amendment, United States Constitution*:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

*Section 48.193, Fla. Stat. (1983)*:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> • • •
>
> (b) Commits a tortious act within this state.
>
> • • •
>
> (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

## STATEMENT OF THE CASE

I. *The Litigation.* This case presents jurisdictional issues which arose in the course of litigation instituted by appellant Burger King Corporation, a Florida corporation, against appellee Rudzewicz, a Michigan resident, in the federal district court for the Southern District of Florida (J.A. 120). Burger King alleged that Mr. Rudzewicz and his co-franchisee owed it $163,604.54 under franchise and lease agreements (J.A. 128), and that the franchisees, through continued operation of their Burger King restaurant after termination of the franchise, were acting in



violation of both federal and Florida trademark laws (J.A. 120, 125, 130-35). After rejecting Mr. Rudzewicz' motion to dismiss for lack of personal jurisdiction (J.A. 138), the district court entered judgment for Burger King on the contract claims (J.A. 160), and found that the franchisees' continued use of Burger King's tradenames and marks constituted infringement, awarding the injunctive relief requested (J.A. 159, 162-63). Before the appeal, however, Mr. Rudzewicz compromised and waived his right to appeal the infringement claim, conceding his improper use of Burger King's tradenames and marks (R. 804-14).

Nevertheless, Mr. Rudzewicz' appeal challenged not only the substantive finding of breach of contract, but also the district court's ruling on the issue of personal jurisdiction. Acknowledging the parties' agreement that Mr. Rudzewicz' conduct satisfied the statutory requirement for long-arm jurisdiction because he failed to make payments in Florida (J.A. 171-72), the circuit court nonetheless held that application of the statute violated Mr. Rudzewicz' due-process rights, because he lacked the requisite minimum contacts with the forum (J.A. 172, 183). This appeal followed.

The propriety of the circuit court's holding depends upon the nature of the relationship between Burger King and Mr. Rudzewicz—and in particular the extent to which Mr. Rudzewicz voluntarily created that relationship for his own benefit. In the following pages, we will examine that relationship by describing 1) the pertinent attributes of Burger King and Mr. Rudzewicz as economic actors; 2) the structure of the joint endeavor which their contract established; and 3) their course of dealing under that contract. The jurisdictional facts are largely undisputed.

II. *The Parties.* The franchisor, appellant Burger King Corporation, is a Florida corporation with its principal offices, including all of its business records, in Miami (J.A.

168; R. 183-87; Tr. 83). As the complaint alleged and Mr. Rudzewicz admitted (J.A. 130, 143), Burger King is one of the world's largest restaurant organizations, with over 3,000 restaurants in its system. As Burger King advised the prospective franchisees in January of 1979 (J.A. 10), Burger King does business in all 50 states, the Commonwealth of Puerto Rico, and 8 other nations. Approximately 80% of that business is conducted through franchised units (*see* J.A. 11). In 1978, that business produced net sales of $479,082,000.00 (X. 21, 24th page; Tr. 171).

Appellee John Rudzewicz is a resident and citizen of Michigan; he is a certified public accountant, the senior partner in a Michigan accounting firm which employs 50 people, and which at the time in question represented a client who owned three Burger King franchises. Mr. Rudzewicz' job is to give financial advice to people. In 1978 he had an income of $170,000.00, and he showed Burger King a net worth of $1,125,000.00. *See* Tr. 39, 40-41, 425, 434-36, 450, 476-77.[2] The district court described Mr. Rudzewicz as an "experienced and sophisticated" businessman (J.A. 158; *see* Tr. 648, 649).

III. *The Contracts.* The joint undertaking of Burger King and Mr. Rudzewicz was defined through four principal documents: the offering circular (J.A. 7; X. 21, Tr. 167, 171); the preliminary agreement (J.A. 37; X. 3, Tr. 46, 47); the franchise agreement (J.A. 41; X. 8, Tr. 53-54); and the lease agreement (J.A. 76; X. 9, Tr. 55). Although lengthy and complex, these documents are consistent in emphasizing the central characteristics of this franchise relationship:

A. *The Benefits to the Franchisees.* Burger King leased the restaurant facility to the franchisees (J.A. 79);

2. Burger King franchisees are required to have a net worth of $140,000—with $95,000 liquid. X. 21, 35th page; Tr. 171.



and licensed them to use its trademarks for a period of 20 years (J.A. 45, 57-58). In so doing, Burger King conferred upon the franchisees the benefit of its "high reputation and a positive image with the public as to the quality of products and services available at Burger King restaurants . . ." (J.A. 43); and committed itself to enhance its "positive image" through "advertising, sales promotion and public relations both in the market area . . . in which the Franchised Restaurant is located and on a national basis . . ." (J.A. 54).

The advantages of the trademarks and reputation of Burger King would have been lost to the franchisees, however, unless they also possessed the practical skills needed to operate the restaurant. A good part of these agreements, therefore, specified the operational benefits that Burger King would confer. Burger King would endeavor to obtain "a suitable location within the designated area for the establishment of FRANCHISEE's Franchised Restaurant" (J.A. 37). It would make available "[s]tandard plans and specifications for a free-standing building including furnishings, decor, layout and signs, together with advice and consultation" (J.A. 51).[3] And it would provide a "[p]re-opening training program," "[p]re-opening and opening supervision and assistance," and "[o]pening promotion programs" (J.A. 51).

3. The lease agreement provides some detail about these specifications, requiring approval of all building plans by Burger King's architect (J.A. 79-80); compliance by the franchisees with any request by Burger King to alter the interior or exterior "to reflect the then current image of Burger King Restaurants" (J.A. 90); secural of Burger King's consent to any alterations by the lessees (id.); compliance with any request by Burger King for alterations in the building, to insure conformity with "the then current image of Burger King Restaurants" (id.); approval by Burger King of any signs on the premises (J.A. 93); acknowledgement of Burger King's right of inspection (id.); and the requirement that any restoration of damage to the building "shall reflect the then current image of Burger King Restaurants and conform to the then current design and specifications of Lessor" (J.A. 94).

Operational assistance, however, extended beyond the start-up. Training programs, involving not merely employees but "a designated restaurant manager" (J.A. 53), as well as the franchisee, were prescribed in elaborate length, not only at the outset of the franchise operation (J.A. 39), but also "from time to time . . . in order to implement current operational standards" (J.A. 53). And Burger King's active support extended into day-to-day operations. It offered a "confidential MOD Manual containing the standards, specifications, procedures and methods for operating a Burger King Restaurant" (J.A. 52); "[a] standardized accounting, cost control and inventory control system" (id.); and updates regarding any "new developments, techniques and improvements of BKC in food preparation, equipment, food products, packaging and restaurant management . . ." (J.A. 52). And Burger King agreed to make available "field personnel . . . to assist the franchisee with any individual problems he may encounter" (J.A. 27).

B. *The Benefits to the Franchisor.* In return for these substantial marketing services, the franchisees agreed to pay Burger King a franchise fee of $40,000.00 (J.A. 46); a royalty of 3.5% of gross sales for the use of Burger King's tradenames and marks (J.A. 54); a fee for advertising and sales promotion of 4% of the franchisees' monthly gross sales (J.A. 54); and a specified amount of rent, which might be increased to no more than 8 1/2% of the franchisees' monthly gross sales (J.A. 82).

C. *The Shared Risks of the Franchisor and Franchisee.* The parties to this agreement obviously intended that it would produce benefits for both sides; Burger King would obtain the royalties and other fees, and the franchisees would retain the remaining profits. Of course the central threat to that objective was the risk that the franchise would fail. Implicit in the parties' agreement was



an assumption that the chief cause of such failure would be the franchisees' deviation from central operating standards, resulting in a loss of patronage for the franchisees, and a loss to Burger King of income and goodwill, built up through its trademarks, advertising, and record of success.[4]

In an effort to reduce the risk of failure by assuring the quality of services, the parties agreed to a series of measures designed to maintain the character of the Burger King system:

1. The training and operations' assistance which Burger King agreed to supply the franchisees was in large measure identified as a *mandatory* feature of the arrangement. Thus, "[a]s a condition precedent of the Franchise Restaurant opening, FRANCHISEE and a designated man-

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4. Thus the first four paragraphs of the franchise agreement make clear that the benefits to both sides of this agreement derive from a mutual effort to achieve the goals of a uniform system (J.A. 43-44):

> A. BKC is the owner of certain trademarks and service marks including BURGER KING which has been registered with the United States Patent and Trademark Office.
>
> B. BKC has developed a restaurant format and operating system, including a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered, and procedures for inventory and management control (the Burger King System) and is engaged in the business of operating and granting franchises to operate Burger King Restaurants using the Burger King System and the marks BURGER KING and WHOPPER and such other marks as may be authorized from time to time for use in connection with Burger King Restaurants (the Burger King Marks).
>
> C. BKC has established a high reputation and a positive image with the public as to the quality of products and services available at Burger King Restaurants, which reputation and image have been and continue to be unique benefits to BKC and its Franchisees.
>
> D. FRANCHISEE recognizes the benefits to be derived from being identified with and licensed by BKC, and being able to utilize the Burger King System and the Burger King Marks which BKC makes available to its franchisees.

ager shall complete BKC's training program at locations specified by BKC" (J.A. 39). Building standards, as well as signs, equipment, and furnishing specifications, were equally obligatory (J.A. 39, 48). And perhaps most important, adherence to operating standards, established and detailed in the Manual of Operating Data (MOD Manual), or otherwise fixed by Burger King, was specified as "reasonable, necessary and essential to the image and success of each Burger King Restaurant and the Burger King Restaurant System" (J.A. 47).

2. The agreements emphasize these mandatory requirements as essential to maintain a *uniform* system. Burger King attributed its "high reputation and . . . positive image" in important part to "a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered . . ." (J.A. 43).[5]

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5. Thus, under the heading of "Standards and Uniformity of Operation" (J.A. 46-47), the franchise agreement makes clear that the various specifications in these contracts are designed to insure conformity with a *system* of operating:

> The Burger King System is a comprehensive restaurant format and operating system for the sale of uniform and quality food products, emphasizing prompt and courteous service in a pleasant atmosphere. The establishment and maintenance of a close personal relationship between BKC and FRANCHISEE in the operation of the Franchised Restaurant and adherence to the principles of the Burger King System constitute the basic underlying substance of this license.
>
> Suggestions from franchisees for improving products, equipment, uniforms, restaurant facilities, service format and advertising are encouraged and will be considered by BKC when adopting or modifying standards, specifications and procedures for the Burger King System.
>
> FRANCHISEE acknowledges and agrees that adherence to BKC's restaurant design and color schemes, signage, interior decor and equipment systems requirements, menu and service format and the provisions of the Manual of Operating Data (MOD Manual) are reasonable, necessary

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To assure such conformity, these agreements either permit no deviation from specified requirements (standards of food preparation (J.A. 49), uniforms (J.A. 50), advertising (*id.*)); or allow modification only if "approved in writing by BKC" (J.A. 49, installation of vending machines). It would literally be impossible to quote all of the detailed quality controls enforced by Burger King in these agreements (*see generally* J.A. 7, 22, 24-33, 31, 37, 39, 48-50, 79-80, 83-84, 90, 93-94, 107, 118). The smallest details are prescribed, from the menu (J.A. 7); to the "quality, appearance, size, taste, and processing" of products (J.A. 26); to the "signs, equipment and furnishings" (J.A. 39); to the telephones, newspaper racks, and vending machines (J.A. 49); to the "ingredients, methods of preparation and service, weight and dimensions of products served, and standards of cleanliness, health and sanitation" as well as packaging (*id.*); to the minimum hours and days that the restaurant would be open (J.A. 49-50). Of course, Burger King maintained a right of inspection to insure conformity with all of these requirements (J.A. 39, 50).

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> and essential to the image and success of each Burger King Restaurant and the Burger King Restaurant System. The MOD Manual contains the official mandatory restaurant operating standards, specifications and procedures prescribed from time to time by BKC for the operation of a Burger King Restaurant. The MOD Manual shall be kept at the Franchised Restaurant at all times and all changes or additions shall be inserted upon receipt. FRANCHISEE agrees that changes in the standards, specifications and procedues [sic] may become necessary and desirable from time to time and agrees to accept and comply with such modifications, revisions and additions to the MOD Manual which BKC in the good faith exercise of its judgment believes to be desirable and reasonably necessary. The confidential and proprietary material and information of BKC set forth in the MOD Manual is to be used by FRANCHISEE only in connection with the operation of the Franchised Restaurant and other licensed Burger King Restaurants. The MOD Manual and other specifications, standards and operating procedures communicated in writing to FRANCHISEE shall be deemed a part of this Agreement.

When the franchisees entered into these agreements, they could have no doubt that they were not simply purchasing a restaurant, but entering into an "operating system (the Burger King System)" (J.A. 37).

3. Finally, the agreements address the risk of business failure through a complex commitment to *joint accountability*. Thus, Burger King insisted upon "a strong personal identification between the individual applicant and the management and ownership of the franchised unit" (J.A. 31). To this end, "at least one of the named franchisees must personally participate in the direct operation" of the restaurant (*id.*); and the agreement elaborately and carefully regulates the assignment, inheritance, and sale of any franchise (J.A. 61-66). To reenforce this accountability in the franchisees, the agreement confers upon Burger King extensive rights to monitor operation of the franchise, not only by the physical inspection noted above, but also by elaborate accounting requirements (J.A. 55-56, 83-84; X. 21, 37th page; Tr. 171).

To underline the importance of the franchisees' participation in a centralized system, and to emphasize Burger King's determination to insure compliance with that system, these agreements repeatedly focus the franchisees' attention toward Burger King's national headquarters in Miami. They identify Burger King as a Florida corporation centered in Miami (J.A. 11, 37, 43, 72, 79). They provide that relevant notices must be sent to Miami (J.A. 73, 118). They provide that relevant payments should be sent to Miami (J.A. 118; R. 184, 185; Tr. 85-86).[6] The

6. Under the franchise agreement, the amount of royalty and advertising payments are computed as a percentage of sales, and all sales figures are kept in the Miami office (Tr. 146, 151-53). They are fed into the central computer, and the amount of royalty and advertising fees assessed (Tr. 88, 161-62). The Miami computer also runs the sales figures against the lease agreement's requirement (J.A. 82) that rental payments

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franchise agreement declares that it is made in Miami (J.A. 43). Both the lease and franchise agreements call for the application of Florida law (J.A. 72, 118).[7] Finally, the lease agreement calls for arbitration in the event of some partial condemnation or restoration of the premises (J.A. 107), and requires that such arbitration "shall" be held in Miami (J.A. 118). Thus, just as the agreements prescribe and define a uniform franchising system, so do they identify Miami as the source of that system.

On the basis of these documents alone, it is fair to conclude that the franchisees knew that they were entering into a long-term relationship with the Burger King headquarters in Miami. As the franchise agreement advised them: "The establishment and maintenance of a close personal relationship between BKC and FRANCHISEE in the operation of the Franchised Restaurant and adherence to the principles of the Burger King System constitute the basic underlying substance of this license" (J.A. 46-47). That kind of relationship, with the central objective of securing compliance with uniform operating standards, is a defining characteristic of the franchise. *See* H. Brown, *Franchising Realities and Remedies* 16 (1978). As Burger King's offering circular advised the franchisees in this

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be enhanced to 8 1/2% of total sales in the event that that calculation produces a higher rent than the amount of rent specified in the lease (Tr. 210). Likewise, it is Burger King's Miami office which is billed for all real estate taxes, and which then bills the franchisees (Tr. 86, 89, 133).

7. The franchise agreement also provides that this "choice of law designation does not require that all suits concerning this Agreement be filed in Florida" (J.A. 72)—which should have suggested to the franchisees that such suits *may* be filed in Florida. It provides further that the franchisee (but not the franchisor) is required to conduct his business in a manner which complies with the law of the state or political subdivision in which the restaurant is located (J.A. 72); and that if any provision of the contract is invalid under Florida law, it may be validated by reference to the law of the state in which the restaurant is located (J.A. 72-73).

case, it is the key to success for both sides: "Uniformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor" (J.A. 31). Of course the franchisee gives up a measure of independence; but as these agreements make clear, the franchisee receives substantial marketing benefits in return.[8] One of the obvious benefits is that the franchisee's investment of money and skill is substantially less.[9] That is in part a product of the franchisor's centralization; it would clearly cost Burger King more to fragment its policymaking apparatus in more than one location, and that cost would clearly be passed on to franchisees. The terms of the agreements just summarized, therefore, embrace the central attributes of a franchise relationship. And those attributes were clear to the franchisees from the very beginning.

IV. *The Parties' Actual Course of Dealings.* From start to finish, the actual course of dealings between Burger King and Mr. Rudzewicz confirmed what the agreements require—a continuing involvement by Burger King's Miami headquarters with Mr. Rudzewicz' Michigan operation, and a parallel involvement by Mr. Rudzewicz with Burger King's Miami policymaking.

Burger King did not solicit the business of Mr. Rudzewicz and his co-franchisee Brian MacShara (Tr. 428). The idea was Mr. MacShara's; he brought in Mr. Rudzewicz,

8. *See generally* H. Brown, *supra*, at iv, 1 n.2, 2, 8-9; R. Dias and S. Gurnick, *Franchising, the Investor's Complete Handbook* 15-16, 21 (1969); R. Metz, *Franchising: How to Select a Business of Your Own* 11-12 (1969); Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. L. & Ec. 227-28, 230 (1978).

9. *See Ungar v. Dunkin Donuts of America, Inc.*, 531 F.2d 1211, 1222 (3rd Cir.), cert. denied, 429 U.S. 823 (1976); H. Brown, *supra*, at 9, 16-17, 22-23; R. Dias and S. Gurnick, *supra*, at 21; R. Metz, *supra*, at 10; Caves, *Franchising: Firms, Markets, and Intangible Assets*, 42 South. Ec. J. 572, 574-75 (1976).



and the two solicited Burger King, seeking its "approval for franchise" (Tr. 42)—which application was "approved" (Tr. 45, 481; *see* X. 2, Tr. 44, 45; Tr. 428, 476). We should emphasize that the franchisees did not want simply to open a restaurant and sell hamburgers in Michigan. They wanted a *Burger King* restaurant—part of a nationwide network utilizing standardized facilities and trademarks—with national advertising, assistance from an experienced and centralized national organization, and a built-in clientele. They wanted to minimize their risks and their costs by trading autonomy for national interdependence. They sought out that relationship; they voluntarily created a contact with the forum.[10]

The negotiations began in the Fall of 1978 (Tr. 42). From almost the first contact, until the lawsuit was filed over three years later, as the following discussion makes clear, the franchisees dealt directly and repeatedly with Burger King's Miami office.[11] The initial franchise offer-

10. As Burger King noted in its letter approving their application (X. 2; Tr. 44, 45), its "experience and record of success minimizes the possibility of failure . . . ." That letter also advised the franchisees that their building must be "approved," that their equipment must be "standard," that they were "responsible" for purchasing certain specified equipment, and that any requests for deviation had to be "channeled through" Burger King's district office. From the very start, therefore, the franchisees knew that they were buying into a system involving tight control by Burger King.

11. The circuit court's opinion states that Burger King's Michigan district office was "Burger King's sole representative in dealing with Rudzewicz and MacShara" (J.A. 169). We do acknowledge that the franchisees had direct contact with the district office, mostly in the ministerial context of forwarding information or inquiries to Miami (*see, e.g.*, Tr. 128-29, 131, 138-41, 158-61, 388, 494-95, 523). There is no evidence, however, that the district office had any independent decisionmaking authority. For example, requests for changes in the building design or equipment were "channeled through" the district office to Miami (X. 2; Tr. 44, 45); the district office was helpless to waive the required site development fee, and referred Mr. Rudzewicz to Miami (Tr. 416); and the same thing happened regarding the important amount of rent (Tr. 293-95, 363, 496). As the following

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ing circular, providing preliminary information to the prospective franchisees, was prepared in Miami and sent to Mr. Rudzewicz and Mr. MacShara in January of 1979 (J.A. 7; X. 21, Tr. 167, 171; *see* 167-73, 262). It was the Miami office which negotiated with the State of Michigan concerning the contents of this offering circular for Michigan residents (Tr. 171-72, 187-88, 227-29, 235-39). In addition to outlining the interdependent nature of the franchise relationship, it also provided the franchisees with advance copies of the lease and franchise agreements which they eventually signed (*see* X. 21—not reprinted in Joint Appendix).

In February of 1979, the franchisees entered into a preliminary agreement for the purchase of a Burger King franchise, which covered a 12-month period in which to agree upon an acceptable site (J.A. 37; X. 3, Tr. 46, 47). That document, as we have noted already, emphasized the long-term relationship into which the franchisees were entering. After they signed it, in consultation with Burger King's Michigan people, the franchisees decided to acquire an existing Burger King restaurant in Drayton Plains, Michigan (Tr. 322, 477).[12] In March—before either a

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discussion makes clear, the franchisees not only dealt directly with Burger King's Miami office, but did so on the key policy questions which became the subject matter of the litigation. We note, for example, the following written correspondence between the franchisees and the Miami office: X. 4 (Tr. 48); X. 5 (Tr. 49); X. 6 (Tr. 50); X. 7 (Tr. 51-52); X. 16 (Tr. 73); X. 17 (Tr. 73, 74); X. 18 (Tr. 76); X. 19 (Tr. 76-77); X. 22 (Tr. 177); X. A (Tr. 97); X. B (Tr. 102); X. F (Tr. 131); X. G (Tr. 141, 142); X. K (Tr. 314, 317-18).

12. The circuit court's opinion states that it was Burger King's Michigan district manager who "persuaded" the franchisees to acquire an existing store rather than incurring the higher cost of building a new one (J.A. 169). We have been unable to find any evidence of record supporting this conclusion. To the contrary, the franchisees never contemplated building a new store, and never asked for approval to build a new store,

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lease or franchise agreement had been made—the franchisees contracted with Burger King's Davmor division, which is located in Miami, for the purchase of store equipment (X. W, pp. 3-8; Tr. 371, 378; *see* Tr. 86, 89, 153, 233, 272, 274, 369-72, 461, 463, 488, 597). Like all the others, this contract identifies Burger King as a Florida corporation, and provides in its last paragraph—just above the signatures—that it is governed by Florida law (X. W at 3, 8). The Davmor division billed the franchisees from Miami, and they made payments back to Miami (Tr. 89, 155).[13]

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because they knew from the start that they could not afford one; they also wanted an existing store because that was faster; and it was the franchisees who decided on the specific site and "pushed" for it (Tr. 484), and who then were told by Burger King that it was available. *See* Tr. 312, 484-86.

13. The circuit court's opinion states that Burger King's Michigan district manager "convinced" the franchisees to purchase the equipment before the final franchise and lease agreements, containing the precise amount of rent, had been written (J.A. 169). In contrast, the trial court found that none of the franchisees' decisions were the product of "economic duress or disadvantage" (J.A. 158). To the extent that this finding is relevant to the parties' bargaining strength, and thus to the fairness of Mr. Rudzewicz' subjection to the jurisdiction of a Florida court, it is a jurisdictional finding no less entitled to deference than any other factual finding; it may be set aside only if clearly erroneous under Rule 52(a), Fed. R. Civ. P. *See Combee v. Shell Oil Co.*, 615 F.2d 698, 700 (5th Cir. 1980); *Lyons v. Salve Regina College*, 565 F.2d 200, 203 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978). *See generally* 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2589, at 759 n.74 (1971). Thus, the jurisdictional facts must be considered in the light most favorable to the trial court's finding of jurisdiction, *see Glasser v. United States*, 315 U.S. 60, 80 (1942), taking all the fair inferences in that light, with due deference to the trial court's assessment of credibility, *see United States v. Espinoza-Franco*, 668 F.2d 848, 849 (5th Cir. 1982); and those findings may be disturbed only upon a firm conviction that a mistake of fact has been made. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

In this context, we respectfully submit that there is no evidence supporting the circuit court's conclusion that Burger King "convinced" the franchisees to contract for equipment before

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In April, co-franchisee MacShara attended courses at Burger King's training school in Miami (*see* X. Y; Tr. 381, 542; *see also* Tr. 506, 540).[14] In May, Burger King's Miami office received from the franchisees the papers which were necessary to permit preparation of the final lease and franchise agreements (Tr. 179, 197-98). As we have noted, note 13, *supra*, Burger King was anxious to get the store open by the end of its fiscal year, May 31. On May 29, Mr. Rudzewicz learned by telephone what his rent would be (Tr. 497). On May 30, he wrote a forceful letter to Burger King's Michigan office declaring his unilateral decision "to withhold all monies for equipment and other start-up costs for the above store" pending provision of the final lease and franchise agreements, an explanation of the rent and other charges, and sufficient time to get the store ready (X. M-E; Tr. 493, 495). The

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reviewing the relevant documents, or obtaining whatever other information they may have desired. To the contrary, Mr. Rudzewicz testified simply that Burger King provided him with an equipment list, and that he contracted with Davmor to purchase equipment (Tr. 463). There is general evidence that Burger King "encouraged" the franchisees to get the store open before the end of Burger King's fiscal year, or by May 31, 1979 (Tr. 461; *see* Tr. 52-53, 230-31, 288, 380); and Mr. Rudzewicz testified that he felt pressured to get the store ready by that date (Tr. 285, 380). As it turned out, with Burger King's compliance, the store did not open until June 4 (*see* X. X; Tr. 379, 381; *see also* Tr. 379-81). This is all the evidence we can find which bears on this question.

14. The circuit court found that this physical contact with the forum could not be attributed to Mr. Rudzewicz because he and Mr. MacShara "never formed a partnership" (J.A. 182 n.14). But the franchisees did form a partnership for the purpose of leasing equipment, called R.M.B.K.-2, to which partnership R.M.B.K. Corp. assertedly transferred all interest in its contract with Burger King's Davmor division (X. W). *See* Tr. 273, 438-39, 447-49, 458. In addition, the following documents refer to Mr. Rudzewicz and Mr. MacShara as "partners" in this franchise: X. 1 (Tr. 42, 43); X. 2 (Tr. 44, 45); X. 8, pp. 2, 9, 11 (Tr. 53-54). They were jointly and severally liable under both the franchise agreement (J.A. 74) and the lease agreement (J.A. 114). And throughout the trial, they continually referred to each other as "partners" (Tr. 43-44, 78, 99, 100, 103, 465, 467, 552, 561, 565, 624, 625).



letter declared that Mr. Rudzewicz had "no alternative except to stop all actions." It suggests that he was not very intimidated by Burger King's bargaining position.

As the circuit court found (J.A. 169), the rent quoted by Burger King was more than Mr. Rudzewicz had expected to pay. There was a good deal of testimony at trial, almost all of it from the franchisees' witnesses, about the extent to which that expectation was a reasonable product of Burger King's representations.[15] For its part, Burger King was content to impeach this testimony, *see* note 15, *supra*, and to rest with its contention (*see* Tr. 644)—which the trial court endorsed (J.A. 161)—that re-

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15. *See, e.g.*, Tr. 134-36, 150-51, 174, 265-72, 292, 294, 300, 304-08, 407-10, 416, 496. The controversy centered around the method by which Burger King computed the rent. The franchise offering sent to Mr. Rudzewicz in January of 1979 provides that the franchisee will pay a minimum rental of 13.4% of "approximated capitalized site acquisition and construction costs, or 8.5% of monthly gross sales, whichever is greater" (J.A. 23). The circuit court's opinion (J.A. 170 n.4) attributes to Mr. Rudzewicz the testimony that he simply assumed that because he was taking over an existing store, the "construction" cost to be utilized for the purpose of computing rent would be the cost of renovating the building—and nothing more (*see* Tr. 267, 269). Since the cost of remodeling was about $180,000.00, Mr. Rudzewicz, according to the circuit court (J.A. 170 n.4), figured that he would be paying between $2,000.00 and $2,500.00 a month (Tr. 267, 409-10). But as Mr. Rudzewicz acknowledged on cross-examination (Tr. 407), Burger King told him that the rent would be computed not simply on the cost of renovation, but also on the present value of the building; and as a certified public accountant, Mr. Rudzewicz acknowledged that the building would have some remaining value even after depreciation (Tr. 408). Thus, his own calculations were unreasonable. Apparently recognizing this problem, the circuit court's opinion states that Mr. Rudzewicz "boosted his projections" from around $2,000.00 to around $2,500.00 in order "to amortize the additional cost of original construction." To the contrary, Mr. Rudzewicz testified that his estimates were based on the cost of remodeling, and on the rental which was being paid by a nearby Burger King (Tr. 409-10). In short, he made an "assumption" (Tr. 410), because Burger King was *not* making any representations about the amount of rent. In this context, the circuit court's opinion states the facts in the light least favorable to the trial court's finding that Burger King made no misrepresentations about anything (J.A. 157).

gardless of any representations made before the lease agreement was signed, Mr. Rudzewicz signed it with full knowledge of the specific rent which he would be obligated to pay (*see* Tr. 294-95). Before doing so, however, he telephoned Burger King's regional office, and as the circuit court notes (J.A. 169-70), was told that the computation of rent was out of its hands (*see* Tr. 363, 496). The reason, as Mr. Rudzewicz was informed (Tr. 293-95), is that such questions are addressed by the Miami office (Tr. 85, 89, 135, 174, 463). After consultation with the Miami office, Mr. Rudzewicz was able to secure a reduction in rent for the third year of $10,439.04 (X. I; Tr. 222; *see* Tr. 223, 500).[16]

The lease and franchise agreements were prepared in the Miami office (Tr. 176). They were signed first by the franchisees in Michigan, and then by Burger King in Miami, which means that both contracts were made in Miami under Florida law.[17] We have discussed these

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16. The circuit court is right that this reduction is insignificant compared with the full amount of rent over 20 years (J.A. 182 n.12); but taken in the light most favorable to the trial court's finding of jurisdiction, it does suggest that Burger King lacked the unilateral power to dictate the terms of this contract. Thus, Mr. Rudzewicz was not faced with the distasteful choice of accepting the prescribed rent or ripping out the equipment which he had already installed in the premises (*see* J.A. 170). Moreover, as we have noted, nn. 13, 15, *supra*, the decision to purchase that equipment was Mr. Rudzewicz' alone; he twice acknowledged that he had purchased the equipment despite his inability to get a firm estimate of either the amount of rent or the method of computation (Tr. 410, 416).

17. The documents were prepared in Miami and sent to the franchisees in Michigan (X. 22, Tr. 176-77; X. 23, Tr. 177-78; *see* Tr. 202, 265). The franchisees signed the contracts at a "closing" held in Michigan on June 4, and returned them to Miami (J.A. 43, 79, 116). Sometime before June 7, Burger King's Miami office reduced the third-year rent in the lease agreement, initialed the change, and apparently sent the agreement back to Michigan for the franchisees' initials (*see* X. I; Tr. 222). Both the rent and franchise agreements were then signed by Burger King in Miami sometime before June 18, when fully-executed copies were sent back to the franchisees for their files (X. K; Tr. 314, 317-18; *see also* Tr. 201-02).



documents in great detail, and the regulatory mechanism which they established.

The store opened in early June, and in the Spring and Summer months the profits were quite good (Tr. 121, 148). The franchisees sent payments to Burger King's Davmor division in Miami under the contract for equipment (Tr. 92, 274, 458); and sent payments to Burger King in Miami for advertising and for real estate taxes (Tr. 91). As the circuit court noted (J.A. 168), the problems came with the Winter recession (*see* J.A. 158; Tr. 121, 123-24, 148, 533); between November of 1979 and April of 1981, the record discloses a series of communications from Burger King's Miami office to the franchisees, demanding that they bring their account up to date.[18]

Although the Michigan office was involved in this extended period of negotiation, there is no evidence that any of the Michigan officials had any decisionmaking authority, *see* note 11, *supra*. In contrast, this correspondence indicates that the Miami office controlled the negotiation. All matters relating to credit are handled in Miami—not through the regional offices (Tr. 84, 94-95, 107). It was the Miami office which determined the initial delinquency (Tr. 96), and requested the initial notices of default (X. C, Tr. 103; *see* Tr. 103-05, 163). And it was at least three different officials in the Miami office who engaged the franchisees in a continuous series of telephone conversations about how to work out the problem (Tr. 97-98, 100, 141-42, 151-52, 158, 165-66, 395-96, 524; *see* X. H, Tr. 221-22). Finally, after 18 months of negotiation, Burger

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18. In chronological order, these are X. A (Tr. 97; *see* Tr. 98, 163); X. B (Tr. 102); X. 16 (Tr. 73; *see* Tr. 74, 93-94, 194); X. 17 (Tr. 74; *see* Tr. 73-75); X. F (Tr. 131; *see* Tr. 131-32); X. G (Tr. 141, 142; *see* Tr. 165-66); X. 18 (Tr. 76); X. 19 (Tr. 76-77).

King brought the instant action in Miami,[19] claiming breach of contract and trademark infringement under both federal and Florida common law (J.A. 120, 130-35).[20]

## SUMMARY OF THE ARGUMENT

It might be appropriate to begin by emphasizing what this case is not about. Suppose, for example, that Mr. Rudzewicz had opened his own local restaurant in Michigan, finding it necessary to order a piece of equipment from Florida. Under the language of §48.193(1)(g), and its consistent interpretation by the Florida courts, his default in payment would suffice to confer jurisdiction in Florida. Under such circumstances, we acknowledge a serious constitutional question. Personal jurisdiction is essentially a matter of relationships; and from a purely economic standpoint, a discrete monetary obligation has almost "zero impact in creating any extra-transactional relation between the participants in the market."[21] Thus,

19. During all this time, of course, the franchisees could have brought an action against Burger King in Michigan—asserting all the claims which they eventually asserted in their Florida counterclaim (J.A. 146). As we have noted, the franchise agreement permits either party to bring an action somewhere other than Florida (J.A. 72); and in fact, the initial offering circular informed the franchisees about a number of extant suits involving Burger King in jurisdictions other than Florida (J.A. 16-20).

20. Burger King's tradenames and trademarks are referred to throughout the documents (J.A. 29, 43, 57-58, 70, 139). They are found in X. 24 (Tr. 186-87). The franchise agreement created a license to use them (J.A. 45). The notice of termination advised the franchisees that they were in violation of federal and state trademark laws (X. 19; Tr. 76-77). Another notice demanded return of the store (X. F; Tr. 131-32). Testimony on the trademark claims is found at Tr. 67-72, 78-79, 184-87. Opening and closing arguments on these claims are found at Tr. 16-17, 608-10.

21. MacNeil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854, 856 n.4 (1978).



although we do not and need not concede the jurisdictional question in this example, we acknowledge its difficulty.

The circuit court's decision ends up at the wrong place because it starts at the wrong place, assuming that this case is no different from the hypothetical advanced above: "This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami" (J.A. 172). But this case is not about the failure to pay money in a "discrete transaction," MacNeil, *supra*, at 854. It concerns instead a "relational contract" at the other end of the economic spectrum—contemplating not simply a series of monetary payments in the future, *id.* at 857-58, but a variety of mutual obligations, both general and specific, which require continuing interaction between the parties. *See id.* at 866-67, 887.

The general character of the franchise relationship is described in the authorities cited at pages 11-12, *supra*. The attributes of this particular relationship have been exhaustively detailed. The purchase of this franchise was not a one-shot transaction—like an order from the Sears catalogue—after which both parties go their own way. The purpose of this contract was to bring the parties together—to *create* a relationship between them—to create risks and obligations on both sides, and foreseeable consequences of failure, on both sides.

In return, both sides obtain advantages. The franchisor obtains another outlet, and the promise of monetary gain. The franchisee receives the benefits of a national organization, its national advertising and reputation, its national infrastructure. The price is not simply a percentage of profits, but a measure of autonomy—in the franchisee's willingness to conform his behavior to a strict set of guidelines upon which his own success, and the franchisor's success, both depend.

It is only in the context of that relationship—a relationship extending from Miami to Michigan—that the trial court's exercise of jurisdiction can be assessed. It is that relationship—not the duty to pay money—which is dispositive of this case. The appellant's central contention is that when Mr. Rudzewicz rejected the option of casting his economic fortunes with a purely-local business, and chose instead the safer route of associating himself with a national organization based in Miami, he purposefully availed himself of the benefits and protection of the forum. He did so not simply by conferring an economic benefit on a Florida corporation, not simply by promising to arbitrate in Florida, or to send money and notices to Florida, and not simply by signing three separate contracts which conferred upon him the benefits and responsibilities prescribed by Florida law. In addition to all of this, he did so by agreeing to conduct a substantial portion of his business *in* Florida, to the extent that the finest details of his enterprise were prescribed and enforced *from* Florida. He did so because the conduct of his business was foreseeably dependent on decisions and instructions made elsewhere—in the context of an ongoing relationship. And because of that relationship, we suggest that jurisdiction in Florida would have been appropriate in this case (assuming an available long-arm statute) whether or not the contract called for payments in Florida.

The litigation in this case grew out of that relationship, and tested its requirements—making Florida the most appropriate place to handle it. The obligation to defend there was not shown to have hindered Mr. Rudzewicz' defense to any extent. In contrast, it was significantly beneficial not only to Burger King—whose overriding goal of uniformity is enhanced by the resolution of disputes, and thus the legal evolution of its business



practices, in a single jurisdiction; but also to the State of Florida, which is interested not only in the application of its own law, but in protecting both the business expectations and the business reputation, derived from its good name and trademarks, of a Florida corporation. Since these interests were created by the franchisees' deliberate and voluntary choice of associating themselves with the forum, there was no constitutional infirmity in its exercise of jurisdiction in this case.

Finally, we argue that Mr. Rudzewicz' post-trial compromise of the trademark claims was a waiver of any challenge to the jurisdiction of the district court.

## ARGUMENT

### I. This Court Has Jurisdiction Under 28 U.S.C. §1254(2) Because the Circuit Court Held That §48.193(1)(g) of the Florida Statutes—Which Confers Long-Arm Jurisdiction Upon One Who Breaches a Contract in Florida by Failing to Perform Acts Required by the Contract to Be Performed in Florida—Is Unconstitutional As Applied.

We have briefed this question in our Jurisdictional Statement (pp. 8-12), and will not repeat that discussion. The jurisdictional statute in this case, unlike those at issue in several recent decisions of this Court, does not simply codify constitutional limits, and thus by its own terms render all questions of statutory construction irrelevant.[22] Instead, §48.193(1)(g) broadly extends to "any cause of action arising from . . . [b]reaches of contract in this

22. *See, e.g., Calder v. Jones,* ..... U.S. ....., 104 S. Ct. 1482, 79 L. Ed.2d 804, 810 n.5 (1984) (hereinafter *"Calder"*); *Kulko v. Superior Court of California in and for the City and County of San Francisco,* 436 U.S. 84, 90 n.4 (1978) (hereinafter *"Kulko"*); *May v. Anderson,* 345 U.S. 528 (1953).

state," which in turn are broadly defined by reference to any "acts required by the contract to be performed in this state." The federal courts are *Erie*-bound[23] to follow the Florida courts' construction of this expansive language, and eleven Florida decisions, representing all five of the appellate districts, have flatly held that the contractual failure to make payments due in Florida is alone sufficient to confer jurisdiction over a cause of action growing out of the contract.[24]

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23. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

24. *Chen v. Watter*, 421 So.2d 771, 772 (Fla. 4th DCA 1982) (per curiam); *Carroll Associates, Inc. v. Video Applications, Inc.*, 421 So.2d 3 (Fla. 5th DCA 1982) (per curiam); *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 n.3 (Fla. 3rd DCA 1982); *Guritz v. American Motivate, Inc.*, 386 So.2d 60, 61-62 (Fla. 2nd DCA 1980); *Wilks v. Swift and Co.*, 382 So.2d 1364 (Fla. 1st DCA 1980); *Professional Patient Transportation, Inc. v. Fink*, 365 So.2d 209, 210 (Fla. 3rd DCA 1978); *Cosmopolitan Health Spa, Inc. v. Health Industries, Inc.*, 362 So.2d 367, 368-69 (Fla. 4th DCA 1978); *First National Bank of Kissimmee v. Dunham*, 342 So.2d 1021 (Fla. 4th DCA 1977); *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082, 1084 (Fla. 2nd DCA 1977); *Feldman v. Southeast Bank of Dadeland*, 323 So.2d 628, 629 (Fla. 3rd DCA) (per curiam), *cert. denied*, 333 So.2d 41 (Fla. 1976). *See Thompson v. King*, 523 F. Supp. 180, 184 (M.D. Fla. 1981) (Florida law).

In contrast, isolated panels in two of the districts have invented a legislative command that the statute be construed according to constitutional limits. *Scordilis v. Drobnicki*, 443 So.2d 411, 412-14 (Fla. 4th DCA 1984); *Lakewood Pipe of Texas, Inc. v. Rubaii*, 379 So.2d 475 (Fla. 2nd DCA), *appeal dismissed*, 383 So.2d 120 (Fla. 1980); *Osborn v. University Society, Inc.*, 378 So.2d 873, 874 (Fla. 2nd DCA 1979). *See Poston v. American President Lines, Ltd.*, 452 F. Supp. 568 (S.D. Fla. 1978) (Florida law). These decisions are not only aberrational but indefensible. Of course the statute should be construed if possible to avoid a constitutional infirmity; and if this statutory language were at all unspecific—like a "doing business" statute—there might be room for such a construction. But this statute says what it says, and any imputation of qualifying language "would be strained." *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc., supra*, 415 So.2d at 115 n.3. *See Grendel's Den, Inc. v. Goodwin*, 662 F.2d 102, 105 (1st Cir. 1981) (en banc), *aff'd*, 459 U.S. 116 (1982); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492 (5th Cir. 1974). Thus, we rely not only upon the overwhelming majority of Florida decisions interpreting this statute, but on the obvious correctness of those decision.



Moreover, the circuit court's ability to construe this statute was limited in this case not only by *Erie*, but also by the defendant, because Mr. "Rudzewicz concede[d] that his activities fall within the reach of the Florida long-arm statute . . ." (J.A. 171).[25] For this reason, if "the opinion below does not purport to determine the constitutionality of the . . . jurisdictional statute,"[26] this silence is attributable to the fact that the process of statutory construction (the first step in judging constitutionality) was in effect *already complete* by the time the case reached the circuit court. The only remaining question was the second step—the determination of constitutional limits. Thus, when the circuit court held that "[j]urisdic-

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25. Given the general language of Mr. Rudzewicz' motion and memoranda in the trial court (J.A. 136-37; R. 116-21, 195-200), it is difficult to tell if he made the same concession there. At the least, his motion was sufficient to place the constitutionality of the statute at issue. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829). *Cf. Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410, 415-16 (1886); *Furman v. Nichol*, 75 U.S. (8 Wall.) 44, 55-56 (1868). And the trial court's order on the motion necessarily implicated that question. *See Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590, 599 (1953); *New York ex rel. Bryant v. Zimmerman, supra*, 278 U.S. at 67; *Willson v. Black Bird Creek Marsh Co., supra*, 27 U.S. (2 Pet.) at 249. In any event, by the time of appeal Mr. Rudzewicz was willing to concede the reach of the statute, and the circuit court addressed the constitutional question without reference to the specific claim raised at trial. *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached it. That is sufficient under our practice"), *citing Raley v. Ohio*, 360 U.S. 423, 436 (1959).

26. *Calder*, 79 L. Ed.2d at 811 n.7. *See Silkwood v. Kerr-McGee Corp.*, ..... U.S. ....., 104 S. Ct. ....., 74 L. Ed.2d 443, 451-52 (1984) ("[W]e have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute . . . . [The appellate court] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionaliy of the statute in their appellate briefs"); *Kulko*, 436 U.S. at 90 n.4 ("The opinion below does not purport to determine the constitutionality of the California jurisdictional statute").

tion under these circumstances would offend the fundamental fairness which is the touchstone of due process" (J.A. 183), it *necessarily* held the Florida statute unconstitutional as applied.

That conclusion is inherent in the construction of this statute embraced by the clear majority of Florida courts; in the obvious correctness of that construction; and in the posture in which this issue came to the circuit court. And that conclusion does not depend upon the circuit court's willingness to acknowledge what it was doing by incanting "some abracadabra."[27] Since the circuit court necessarily declared §48.193(1)(g) unconstitutional as applied, this Court has jurisdiction under 28 U.S.C. §1254(2). *See* Jurisdictional Statement, p. 11 n.16.

## II. The Circuit Court Erred in Holding the Statute Unconstitutional As Applied, Because Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum; Was Called to Answer in a Florida Court for Conduct Growing Out of That Relationship; and Was Not Unfairly Burdened by the Defense.

### A. *The Exercise of Jurisdiction in Florida Did Not Not Offend Due Process.*

The question is whether Mr. Rudzewicz had "certain minimum contacts with [Florida] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[28] That stan-

27. *Flournoy v. Wiener*, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting). *See Franchise Tax Board of California v. United States Postal Service*, ..... U.S. ....., 104 S. Ct. ....., 81 L. Ed.2d 446, 450 n.7 (1984) (and cases cited); *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982).

28. *International Shoe Co. v. State of Washington, Office of Employment Compensation and Placement*, 326 U.S. 310, 316 (1945) (hereinafter *"International Shoe"*), *citing Milliken v. Meyer*, 311 U.S. 457, 463 (1940).



dard is satisfied if the defendant's contacts "make it reasonable, in the context of our federal system, to require [him] to defend . . . ."[29] The constituents of reasonableness must be discovered in the relationship among the defendant, the forum, and the litigation.[30]

We will explore that relationship through three criteria, which conjoin to define the most restrictive view of personal jurisdiction inherent in this Court's modern decisions on the issue: 1) the extent to which Mr. Rudzewicz purposely availed himself of the privilege of conducting activities within the forum state;[31] 2) the extent to which Burger King's lawsuit was related to that purposeful activity;[32] and 3) despite the satisfaction of both criteria, the extent to which subjecting Mr. Rudzewicz to the jurisdiction of a Florida court might otherwise be considered unfair.[33]

1. *Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum.* This Court noted in *World-Wide Volkswagen*, 444 U.S. at 297, that

29. *International Shoe*, 326 U.S. at 317, *cited in World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (hereinafter *"World-Wide Volkswagen"*). *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952).

30. *Calder*, 79 L. Ed.2d at 811; *Keeton v. Hustler Magazine*, ..... U.S. ....., 104 S. Ct. ....., 79 L. Ed.2d 790, 798 (1984) (hereinafter *"Keeton"*); *Rush v. Savchuk*, 444 U.S. 320, 327 (1980) (hereinafter *"Rush v. Savchuk"*); *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977) (hereinafter *"Schaffer"*).

31. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (hereinafter *"Hanson"*).

32. *See Rush v. Savchuk*, 444 U.S. at 328-29.

33. *See Kulko*, 436 U.S. at 92; *International Shoe*, 326 U.S. at 316. On these three criteria, see generally Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 99 (1983) (hereinafter "Lilly"); Brewer, *Jurisdiction in Single Contract Cases*, 6 U. Ark. Little Rock L. J. 1, 11-12 (1983); Note, *Long-arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?*, 61 B. U. L. Rev. 375, 382-83 (1981) (hereinafter "Note").

the "orderly administration of the laws" prescribed in *International Shoe*, 326 U.S. at 319, embraces "a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Thus it is important to determine whether the defendant "engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable." *Rush v. Savchuk*, 444 U.S. at 329. A defendant who acts voluntarily "has clear notice that [he] is subject to suit [in the forum], and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing [his] connection with the State."[34]

Thus, the question is not simply whether the defendant should have foreseen that his conduct would have some impact in the forum, because the defendant may be unable to control entirely even the foreseeable consequences of his acts.[35] The question instead is whether

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34. *World-Wide Volkswagen*, 444 U.S. at 319. *See* Lilly, 69 Va. L. Rev. at 87, 105, 107-08; Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 76, 91-92, 96, 112 (1980) (hereinafter "Brilmayer").

35. *See Calder*, 79 L. Ed.2d at 812; *World-Wide Volkswagen*, 444 U.S. at 295-96. For example, in *Hanson v. Denckla*, 357 U.S. at 252-53, the decedent's execution in Florida of a power of appointment of the trust assets did not confer jurisdiction over the Delaware trustee, because "the record discloses no instance in which the *trustee* performed any acts in Florida," and the trustee was not bound by the "unilateral activity" of others. In *Kulko*, 436 U.S. at 93, 97, the husband had no control over the wife's unilateral decision to move to California, and thus did not submit to its jurisdiction. In *Rush v. Savchuk*, 444 U.S. at 328-29, the defendant driver had no idea when he contracted for coverage by State Farm that he might be subject to suit (on the basis of State Farm's duty to defend him) wherever State Farm does business—and he had no control over State Farm's ubiquity anyway. Nor would he have done any

(Continued on following page)



the defendant should reasonably have foreseen that he would be called to answer for his conduct in the forum,[36] because, through his own purposeful acts, he linked his interests with the forum. By those voluntary acts, he has effectively consented to jurisdiction.[37]

Thus in *McGee*, 355 U.S. at 221-22, the insurer's assignee was an out-of-state company, but had mailed a

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Footnote continued—

better with any other insurer which does business in more than one jurisdiction. And in *World-Wide Volkswagen*, 444 U.S. at 295-98, it was "fortuitous," from the perspective of the retailer and its wholesale distributor, that the automobile which they sold within their restricted market area suffered an accident two thousand miles away. *See also Helicopteros Nationales De Colombia S.A. v. Hall*, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed.2d 404, 412 (1984) (hereinafter *"Helicopteros"*) (acceptance of check drawn on Texas bank a fortuitous contact; "unilateral activity of another" "not an appropriate consideration").

36. *World-Wide Volkswagen*, 444 U.S. at 297. *See Rush v. Savchuk*, 444 U.S. at 328-29; *Schaffer*, 433 U.S. at 216.

37. From this perspective, it is no surprise that absent some evidence of fraud or undue influence, the defendant may bind himself to the jurisdiction through a contractual forum clause—because that is a voluntary, avoidable act. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *See Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 704-05 (1982) (hereinafter *"Insurance Corp. of Ireland"*); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) (hereinafter *"Overmyer"*); *National Equipment Rental v. Szukhent*, 375 U.S. 311, 315-16 (1964); *Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495 (1956); *Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission*, 339 U.S. 643, 648 (1949) (hereinafter *"Travelers Health"*); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506 (1947). *See also* Brilmayer, 1980 Sup. Ct. Rev. at 93. Of course the absence of a forum clause is not "controlling" of the jurisdictional question. *Schaffer*, 433 U.S. at 227 & n.6 (Brennan, J., dissenting). In this case, Burger King chose to conform its contract to the language of the long-arm statute, by calling for payments to be made in Florida. In contrast, §48.193 does not expressly confer long-arm jurisdiction on the basis of a forum clause, and provides for service of process only upon persons subject to Florida jurisdiction "as provided in this section." §48.193(2). The franchise agreement provides that suits are not *required* to be filed in Florida (J.A. 72), thus permitting either party to have sought redress in Michigan, while cautioning both parties to anticipate defending in Florida.

reinsurance certificate to the insured in the forum state, thus soliciting his business.[38] In *Keeton*, 79 L. Ed.2d at 797, the defendant publisher disseminated its magazine nationwide on a regular monthly basis, and thus its publication of a libelous issue in the forum state "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." And in *Calder*, 79 L. Ed.2d at 812-13, the defendant editor and reporter in a libel suit were not charged "with mere untargeted negligence," but with "intentional, and allegedly tortious, actions . . . expressly aimed at California"—and thus they "knowingly cause[d] the injury in California."[39]

The dominant theme of these cases is that the defendant had control over the consequences of his actions. As this Court noted in *Kulko*, 436 U.S. at 97, 100, 101, a defendant is amenable to jurisdiction if he "has sought a commercial benefit from solicitation of business from a resident of [the forum]"; if he derives a "personal or commercial benefit" from the contact; or if he displays an "intent to obtain or expectancy of receiving a corresponding benefit in the State . . . ."[40]

This case meets that standard. The franchisees acted affirmatively and unilaterally when they sought to create

38. *See* Lilly, 69 Va. L. Rev. at 90 n.20; Note, 61 B. U. L. Rev. at 398.

39. *See also Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 627-28 (1935) (defendant's office in forum state is significant because he voluntarily established it, thus effectively consenting to jurisdiction).

40. Defendants consent to jurisdiction who "actively [pursue] commercial transactions throughout the various States," *Helicopteros*, 80 L. Ed.2d at 416 (Brennan, J., dissenting)—who "knowingly reach out from [their domiciles], knowingly causing effects in other States and receiving economic advantages both from the ability to cause such effects themselves and from the activities [of others] in other States"—who "intentionally became part of an interstate economic network . . . for pecuniary gain." *World-Wide Volkswagen*, 444 U.S. at 315 (Marshall, J., with Blackman, J., dissenting).



a long-term relationship with a national organization based in Miami—binding themselves to make payments to Miami and to be governed by Florida law. They could have bought or constructed their own restaurant, and sold hamburgers in a purely-intrastate environment. They chose instead to solicit the support and economies of an interstate network—and the laws of another jurisdiction. This Court has repeatedly acknowledged that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."[41] That result may be inappropriate to the extent that an intrastate enterprise has no choice but to involve itself in certain interstate activities—but that is not this case. In this case, rejecting local options, the franchisees were eager entrants into a 20-year relationship with a nationwide network of 3,000 identical restaurants, all subject to stringent controls dictated by their franchisor.

In this context, the circuit court's distinction between buyers and sellers (J.A. 176-77), and its analogy to mail-order consumers (J.A. 177), are inappropriate. These were not passive consumers in a 20-minute retail transaction; they were active businessmen, who voluntarily entered into a 20-year commercial relationship, a deeply interdependent relationship, with an out-of-state corporation. In *Kulko*, this Court acknowledged a fundamental distinction between transactions of a personal and commercial nature. 436 U.S. at 97, *cited in World-Wide Volkswagen*, 444 U.S. at 316-17 (Marshall, J., with Blackman, J., dissenting).

41. *Hanson v. Denckla*, 357 U.S. at 250-51, *citing McGee*, 355 U.S. at 222-23. *Accord, World-Wide Volkswagen*, 444 U.S. at 292-93; *Kulko*, 436 U.S. at 101. *See Helicopteros*, 80 L. Ed.2d at 416-17 (Brennan, J., dissenting); *World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting); *Hanson*, 357 U.S. at 260 (Black, J., with Burton and Brennan, J.J., dissenting). *Cf. Postal Telegraph Co. v. Richmond*, 249 U.S. 252, 259-60 (1919) ("Even interstate business must pay its way"), *quoted in* Brilmayer, 1980 Sup. Ct. Rev. at 87 n.55.

And this Court has also emphasized the distinction between "an isolated occurrence," *World-Wide Volkswagen*, 444 U.S. at 297, and the creation of "continuing obligations," *Travelers Health*, 339 U.S. 643, 648 (1949).[42]

The circuit court's opinion suggests that the involvement of Burger King's Miami headquarters, as an integral part of the franchise arrangement, somehow came as an "unfair surprise" (J.A. 177). But even the first offering circular advised that Burger King's "business activities . . . are conducted" in Miami (J.A. 11), and in great detail outlined the extent to which Burger King would demand and enforce conformity with its national standards. The preliminary agreement invokes Burger King's "specifications, criteria and performance standards" (J.A. 37). And both the lease and franchise agreements are primarily regulatory mechanisms, which specify in great detail the extent to which Burger King will assure compliance with requirements consistent with a national image. All of the written documents—and indeed the entire course of dealing between the parties—should reasonably have advised the franchisees of the central involvement of the Miami office.

First, three separate contracts—the purchase agreement with Burger King's Davmor division (X. W, pp. 3-8; Tr. 371, 378); the lease agreement (J.A. 118); and the franchise agreement (J.A. 72), all call for the application of Florida law. This is important not simply because it signals Florida's interest in the case, but because it notified Mr.

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42. *See International Shoe*, 326 U.S. at 320 (contacts "systematic and continuous"). *Compare Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.*, 260 U.S. 516 (1923), *cited in International Shoe*, 326 U.S. at 318 ("single or occasional acts" insufficient). In our Jurisdictional Statement (p. 25. n.37), we cited a few lower-court decisions distinguishing between consumer transactions and commercial transactions. We also cited authority rejecting any wooden distinction between buyers and sellers (p. 25 n.41). *See also* Casad, *Long-Arm and Convenient Forum*, 20 Kan. L. Rev. 1, 27 (1971).



Rudzewicz of that interest—an interest foreseeably created by his voluntary decision to enter into these contracts. As we noted in the Jurisdictional Statement (p. 22 n.31), these contracts would be governed by Florida law whether they said so or not. But as this Court has emphasized, the choice-of-law question and the jurisdictional question are two different things.[43] The point here is that the franchisees voluntarily contracted for the application of Florida law. That was a form of consent to jurisdiction in Florida. By expressly invoking "the benefits and protection of the laws of that state," "including the right to resort to the courts for the enforcement of its rights," the franchisees effectively consented to subject themselves to those same judicial processes. *International Shoe*, 326 U.S. at 319.[44]

Second, the lease agreement calls for arbitration under certain circumstances, and specifically provides that such arbitration will be held in Miami. This Court has acknowledged authority that "consent [to jurisdiction is] implicit in agreements to arbitrate."[45] At the very least,

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43. *See Keeton*, 79 L. Ed.2d at 800; *Kulko*, 436 U.S. at 98; *Schaffer*, 433 U.S. at 215; *Hanson*, 357 U.S. at 254. *See also* Brilmayer, 1980 Sup. Ct. Rev. at 95. In this context, we should anticipate Mr. Rudzewicz' argument that Michigan law, specifically the Michigan Franchise Investment Act (*see* J.A. 171), should apply in this case. Even apart from the question of how Mr. Rudzewicz plans to get around his contractual obligations to conform with Florida law, any such contention confuses the substantive issue with the jurisdictional issue. The point in this context is that the contracts called for the application of Florida law, and thus Mr. Rudzewicz purposely created a contact with the forum when he signed them.

44. *See* Note, 61 B. U. L. Rev. at 397. We cite a few lower-court decisions to the same effect at p. 22 n.32 of the Jurisdictional Statement.

45. *Insurance Corp. of Ireland*, 456 U.S. at 704, *citing Victory Transport, Inc. v. Comisaria General De Abastecimientos y Transportes*, 336 F.2d 354, 363 (2nd Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), *and* 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶4.02[3] at 4-47 n.22 (1982). At least one court has also

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this clause was further evidence that decisionmaking is centered in Miami.

Third, as we have noted, these contracts contain numerous references to Florida in a variety of contexts. They declare that the agreements were made in Florida, they identify Burger King as a Florida corporation, they identify Burger King's principal place of business in Florida, they require that notices be sent to Florida, they require that a variety of payments be sent to Florida. These provisions conjoin to put the franchisees on notice that they were dealing, and would be dealing, with a corporation centered in Florida.

The circuit court suggested that a "characteristic disparity of bargaining power" precluded Mr. Rudzewicz from removing any of the contractual provisions which gave him obvious notice of Florida's interest in the contract. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186 (1972). Since Mr. Rudzewicz never asked to remove any of these provisions, there is no evidence of record to support that factual assertion. To the contrary, as we have noted, Mr. Rudzewicz did negotiate a small reduction in rent.[46] Perhaps Burger King would not have given up the quality controls

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Footnote continued—

discovered such consent in a contractual provision, like the one in this case (X. W, p. 3; Tr. 369, 378), that the freight will be F.O.B. shipping point—meaning that the risk of loss shifts to the buyer at the shipping point—because the forum state's fire and theft protection thus becomes available to the purchaser. *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583 (2nd Cir. 1965). *But see Vencedor Mfg. Co. v. Gougler Industries, Inc.*, 557 F.2d 886, 891-92 (1st Cir. 1977); Note, *supra*, 61 B. U. L. Rev. 375, 394-96.

46. At the very least, the franchisees were active participants in the give-and-take concerning the terms of these contracts. *See* Jurisdictional Statement, p. 26 n.42. As a general proposition, although most franchisors have greater economic power than their franchisees, the relationship is symbiotic, producing results which neither the franchisee nor the franchisor could achieve alone. H. Brown, *Franchising Realities and Remedies* 12 (1978).



and supervision which are so pervasive in these contracts,[47] but that does not mean that the contract was unconscionable, one-sided, or somehow involuntary. The franchisees received a great deal in return for their participation in a national system. These contracts manifestly advised the franchisees of the interstate connection which they were voluntarily making, and there is nothing in their formation which converts their voluntary acts into involuntary acts.[48]

Fourth, the course of dealing between the parties demonstrated that the Miami office was calling the shots. The circuit court's opinion reflects the importance of this

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47. *See* H. Brown, *Franchising Realities and Remedies* 18 (1978) ("The franchisor's refusal [to alter the contract] is not mere stubbornness. Rather, he has great economic interest in the very provisions the franchisee finds most objectionable"). Indeed, since the franchise agreement also contains a license for use of Burger King's tradenames and marks, Burger King *could not* have given up control over the quality and public image of the franchise without risking abondonment of its licenses. *See Haymaker Sports, Inc. v. Turian*, 581 F.2d 257, 261 (C.C. Pa. 1978); *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 124-25 (5th Cir. 1973); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2nd Cir. 1959); *Robinson Co. v. Plastics Research and Development Corp.*, 264 F. Supp. 852, 863 (W.D. Ark. 1967).

48. *See Ungar v. Dunkin Donuts of America, Inc., supra* note 9, 531 F.2d at 1223 ("We do not imagine that many persons are, in any meaningful sense, forced to enter into franchise agreements"). As we have noted, the circuit court is preoccupied in its opinion with the extent to which the franchisees were misled about the amount of rent which they would be required to pay, and with the implicit coercion that they sign the contracts or suffer a substantial financial loss (on the already-purchased equipment) unless they did so. The trial court found no such coercion, and with good reason. Moreover, as we have noted, note 43, *supra*, it would be a mistake to confuse the substantive issues with the jurisdictional issue. In *Kulko*, 436 U.S. at 96, this Court reversed the lower court because its opinion "confuses the question of appellant's liability with that of the proper forum in which to determine that liability." The franchisees knew well before they contracted for purchase of the equipment that they were entering into a system of national controls emanating from Miami. They received copies of the offering circular, the lease agreement, and the franchise agreement six months before they signed the agreements, and three months before they contracted to purchase equipment (X. 21; Tr. 167, 171). Thus, the question of whether they felt pressured into signing the contract at some later time is totally irrelevant to the jurisdictional question.

point, in its strained attempt to demonstrate Mr. Rudzewicz' reasonable belief "that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters," and that "the distant corporate headquarters . . . insulated itself from direct dealings with him . . ." (J.A. 179, 180). As we have noted, the record proves otherwise. There was a continual course of written and oral communications between the franchisees and the Miami office, concerning both formation of the contract and the attempt to save the franchise. Even before the franchise agreement was signed, co-franchisee MacShara had attended training courses in Miami, designed to conform his behavior to the national standard. As this Court said in *Rush v. Savchuk*, 444 U.S. at 332, the relationship between Mr. Rudzewicz and Mr. MacShara "may be significant in evaluating their ties to the forum." *Cf. Hanson*, 357 U.S. at 263 (Douglas, J., dissenting). As we have noted, contrary to the circuit court's conclusion (J.A. 182 n.14), the co-franchisees in this case not only had a formal partnership, but in addition, under Florida law, were partners by virtue of their rights and obligations under the franchise agreement.[49] The important point, however, is not simply that Mr. MacShara's physical contact with the forum should be imputed to Mr. Rudzewicz, but that Mr. Rudzewicz' knowledge of the contact was also knowledge of the interest and activity of the Miami office.

That knowledge was reenforced by the evidence that any changes in the terms of the franchise and lease agreements were required to be approved by the Miami office, since the Michigan district office had no decisionmaking authority. *See* note 11, *supra*. And when the franchise got into trouble, that impression was further reenforced

49. *See Webster v. Clark*, 34 Fla. 637, 16 So. 601 (1894); *F.J. Dubos & Co. v. Hoover, Jones & Bowden*, 25 Fla. 720, 6 So. 788 (1889); *Schilpp v. Schilpp*, 380 So.2d 573 (Fla. 1st DCA 1980).



by the constant stream of written correspondence between the Miami office and the franchisees, *see* note 11, *supra*. And as we have noted, p. 19, *supra*, it was accompanied by a constant series of telephone conversations between the franchisees and at least three different officials in the Miami office, in an attempt to work out the financial problem. The unmistakable message is that the Miami office set policy, brokered deviation from policy, and enforced the termination—all in the context of its zealous protection of the national standards so essential to the successful franchise operation. The circuit court's opinion not only fails entirely to state the evidence in the light most favorable to the trial court's finding of jurisdiction, but ignores the central character of the business relationship in this case.

Fifth, the franchisees should have known that their conduct was causing economic injury in Florida. As we have acknowledged, this is not the dispositive question of foreseeability, but it is relevant to the franchisees' reasonable anticipation that they might be called to answer for their conduct in a Florida court.[50] As Justice Brennan wrote in *World-Wide Volkswagen*, 444 U.S. at 311 (Brennan, J., dissenting): "People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared

50. *Calder*, 79 L. Ed.2d at 812 ("California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioner is therefore proper in California based on the 'effects' of their Florida conduct in California"); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943) (place of contract less important than "great weight" accorded the "consequences" of the contractual obligation), *cited in Travelers Health*, 339 U.S. at 648. See the lower-court decisions cited at p. 23 nn.33, 34 of the Jurisdictional Statement. *Cf. Schaffer*, 433 U.S. at 226 (Brennan, J., dissenting). *See also* von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1167 (1966).

to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed."

The franchisees should have known that their failure to make payments to Miami would cause economic harm;[51] and they should have known that their continued and wrongful use of Burger King's tradenames and marks after termination of the franchise would impact most directly at the source of Burger King's national reputation —its principal place of business. As we have noted, Burger King's complaint charged trademark infringement not only under federal law, but also under Florida's common law (J.A. 135).[52] Section 48.193(1)(b), Fla. Stat. (1983), confers long-arm jurisdiction over one who commits a tortious act in Florida. That includes conduct out of state which causes injury in Florida.[53] Our contention is not that tort cases should be allowable on the basis of more attenuated contacts than contract cases.[54] We merely note

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51. An act of omission may cause just as much damage as an act of commission. *See Brilmayer*, 1980 Sup. Ct. Rev. at 90.

52. *See Miami Bottled Gas, Inc. v. Dri-Gas Corp.*, 183 So. 828, 829-30 (1938); *Crown Central Petroleum v. Standard Oil Co.*, 135 So.2d 26, 28 (Fla. 1st DCA 1961), *cert. denied*, 142 So.2d 731 (Fla. 1962).

53. *See Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd.*, 543 F.2d 1107, 1109 (5th Cir. 1976) (Florida law); *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1211 (5th Cir. 1975) (Florida law); *Carida v. Holy Cross Hospital, Inc.*, 424 So.2d 849, 851 (Fla. 4th DCA 1983). *See generally Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1275 (1983); *Simon v. United States*, 644 F.2d 490 (5th Cir. 1981); *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), *cited in World-Wide Volkswagen*, 444 U.S. at 298, *and Schaffer*, 433 U.S. at 223, 226 (Brennan, J., dissenting). As the *Bangor* case makes clear, trademark infringement is a species of tort. *See* Jurisdictional Statement, p. 28, n.49.

54. *See* Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227, 232 (1967).



that we have a tortious act in this case as well as a breach of contract—and that both caused foreseeable consequences in Miami.

On the basis of the foregoing, we think the conclusion is inescapable that Mr. Rudzewicz purposely availed himself of the benefits and protections of the forum. He solicited this contract. He entered voluntarily into an interstate relationship. He knew from the start that he was trading a measure of autonomy for the shelter of a franchise relationship. He knew that the terms and conditions of that relationship were defined and enforced, as a matter of national policy, from Miami. He learned that firsthand in his dealings with Burger King. He saw the tangible evidence in the language of his contracts. He effectively consented to the jurisdiction of the Florida courts, in his contract calling for both arbitration in Miami and for the application of Florida law. And he engaged in conduct which he knew would have its primary effect in Miami. It should have come as no surprise that he was called to answer for his conduct in a Florida court.

2. *Burger King's Cause of Action Arose Out of Mr. Rudzewicz' Contacts with the Forum.* This is a "specific jurisdiction" case—in which jurisdiction is based not on a general presence in the forum, but on specific contacts out of which the cause of action arose.[55] When the contact in question is a single business or contractual relationship, and step 1 is satisfied—that is, the defendant is held to have availed himself in making the contract of the benefits and protections of the forum—then a claim for breach of that contract would necessarily arise out of the contact; and similarly, a tort action arising from the same contractual relationship would also meet the "con-

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55. *Helicopteros*, 80 L. Ed.2d at 411 n.8, *citing* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-64 (1966).

nexity" requirement.[56] That requirement is clearly satisfied in this case. Florida's jurisdiction was invoked solely on the basis of the contractual relationship formed between Burger King and the franchisees. The cause of action for breach of contract and trademark infringement necessarily grew out of that relationship. The elements of that cause of action are identical to the jurisdictional allegations—that is, that the defendants had caused injury in the context of that very relationship which constituted the jurisdictional contact.[57] Indeed, the two specific causes of action—breach of contract for payment of money, and trademark infringement, are both central contacts for jurisdictional purposes. The "connexity" requirement is satisfied.[58]

3. *The Florida Court's Assertion of Jurisdiction over Mr. Rudzewicz was not Otherwise Unfair.* None of this Court's decisions on the question of personal jurisdiction undertake an explicit balancing of the burdens of litigation for the defendant against the interests of the plaintiff and the forum. Instead, they suggest that where, as here, a defendant's purposeful conduct has an obvious adverse impact upon the plaintiff's activities in the forum, *see, e.g., Calder*, 79 L. Ed.2d 804, and where that impact is

56. *See In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 222-23, 231 (6th Cir. 1972), *cited in* Brewer, *Jurisdiction in Single Contract Cases*, U. Ark. Little Rock L. J. 1, 14 (1983). The Florida statute codifies this requirement, creating long-arm jurisdiction over any action "arising from" the specified contacts. §48.193(1), Fla. Stat. (1983).

57. *See* Brilmayer, 1980 Sup. Ct. Rev. at 82, 112.

58. *See Calder*, 79 L. Ed.2d at 811; *International Shoe*, 326 U.S. at 320. *Cf. Keeton*, 79 L. Ed.2d at 801. Some lower-court decisions on the point are cited at p. 24 n.36 of the Jurisdictional Statement. *Compare Rush v. Savchuk*, 444 U.S. at 329, discussed in Brilmayer, 1980 Sup. Ct. Rev. at 100; *Schaffer*, 433 U.S. at 213; *Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.*, 260 U.S. 516 (1923), discussed in *Helicopteros*, 80 L. Ed.2d at 413, and 80 L. Ed.2d at 416 n.1 (Brennan, J., dissenting). *Cf. World-Wide Volkswagen*, 444 U.S. 286, discussed in Brilmayer, 1980 Sup. Ct. Rev. at 88.



in no sense "random, isolated, or fortuitous," *Keeton*, 79 L. Ed.2d at 797, the Court will consider any burdens of litigation to be burdens knowingly incurred. In short, a defendant should be hard-pressed to justify escaping any inconvenience occasioned by his own purposeful behavior, *see* Lilly, 69 Va. L. Rev. at 107, especially since there are less drastic means of redressing practical inconvenience, like a motion for change of venue, which in this case Mr. Rudzewicz has chosen not to pursue. *See* note 62, *infra*. Only when the defendant has created no purposeful links to the forum, therefore, does the due-process clause protect him "against inconvenient litigation." *World-Wide Volkswagen*, 444 U.S. at 291-92.

We submit, however, that even if this Court were to take the unprecedented step of directly balancing the burdens and benefits to both sides, that process would independently support a finding of jurisdiction in this case. First, Florida has a clear interest in protecting the business expectations and reputation of its residents. That interest is codified in the expansive language of the jurisdictional statutes in question, which extend jurisdiction to any contract in which performance is required in Florida, and to any tortious conduct causing injury in Florida.[59] It is especially strong regarding the infringement claims, because they implicate the state's regulatory interest in enforcing its own common-law protection of trademarks and names. This Court has suggested that although the forum's interest should not be dispositive in the absence of evidence that the defendant acted unilaterally to create those con-

59. The statutes reflect Florida's desire to provide a convenient forum for the litigation of those questions. *See Mullane v. Central Hanover Trust Co.*, 329 U.S. 306, 313 (1950), *cited in Schaffer*, 433 U.S. at 223-24 (Brennan, J., dissenting). *See also World-Wide Volkswagen*, 444 U.S. at 302 (Brennan, J., dissenting). *Compare Schaffer*, 433 U.S. at 214-15 (asserted state interest not reasonably reflected in language of long-arm statute).

tacts which gave rise to the forum's interest, the extent of that interest is nevertheless a factor in assessing the fairness of the forum's exercise of jurisdiction.[60]

Thus in *Keeton*, 79 L. Ed.2d at 798-800, even though the forum was not the plaintiff's residence or the principal place of injury, this Court placed heavy reliance on the forum's interest even in redressing "the injury that in-state libel causes within New Hampshire to a nonresident"; and also in cooperating with other states in enforcing the common "single publication" rule requiring an award of all damages caused in all states. Thus, this Court concluded, these two interests "demonstrate the propriety of requiring the respondent to answer to a multistate libel action in New Hampshire."[61]

Our case, of course, is far stronger. By analogy to *Keeton*, perhaps Burger King might have brought this

60. *See Keeton*, 79 L. Ed.2d at 798; *World-Wide Volkswagen*, 444 U.S. at 292, 294; *Kulko*, 436 U.S. at 92, 98, 100; *Schaffer*, 433 U.S. at 208, 215; *McGee*, 355 U.S. at 223 (forum has "manifest interest in providing effective means of redress for its residents"). *Cf. Schaffer*, 433 U.S. at 223 (Brennan, J., dissenting); *Hanson*, 357 U.S. at 259 (Black, J., with Burton and Brennan, J.J., dissenting). *See generally* Brilmayer, 1980 Sup. Ct. Rev. at 89, 105-07. Some lower court decisions on the point are cited at p. 26 nn.45-46 of the Jurisdictional Statement.

61. *Keeton* gave no explicit consideration to the limits of New Hampshire's "sovereign" powers in the interstate system. In *Insurance Corp. of Ireland*, 456 U.S. at 501 n.10, this Court declared that restrictions on state sovereignty are a product solely of individual rights—that there is no inherent constitutional limit on state sovereignty, or else questions of personal jurisdiction could never be waived. *Accord, Hanson*, 357 U.S. at 251. *See Keeton*, 79 L. Ed.2d at 802 (Brennan, J., dissenting). *See generally* Brilmayer, 1980 Sup. Ct. Rev. at 85. In *World-Wide Volkswagen*, however, 444 U.S. at 291-92, the Court appeared to counsel independent consideration of the "limits imposed on [the states] by their status of coequal sovereigns in a federal system." *But see id.* at 294. If New Hampshire's sovereign status in *Keeton* was sufficient to encompass its interest in the damage caused to a New York resident by a California publisher, then Florida's sovereign status easily embraces the interests of a Florida corporation. *See* note 62, *infra*.



action in any state in which it does business, on the ground that the franchisees' asserted trademark infringement diminished to some marginal extent Burger King's goodwill and reputation in that state. Instead, Burger King brought the action where it resides and suffered the principal harm, in the single jurisdiction with the greatest interest in redressing that harm.[62]

Second, Florida has an interest in the application of its own law. We recognize that the Michigan courts are capable of looking up Florida law. Nevertheless, the Florida courts are more "at home" with Florida law.[63] And this interest is particularly strong in light of Mr. Rudzewicz' claim that Michigan law, and not Florida law, should apply.[64] Thus, "when a suiter seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in

62. This is not to deny that Michigan also has an interest in this litigation. The question here is not which state is the more-appropriate forum, because there may be more than one forum which satisfies minimal constitutional requirements. *See Keeton*, 79 L. Ed.2d at 801; *World-Wide Volkswagen*, 444 U.S. at 301 (Brennen, J., dissenting). Independent of Michigan's admitted interest, the question is whether Florida's interest, coupled with all the other contacts, is minimally sufficient. Of course, if Michigan's interest were far greater, the appropriate remedy would have been a change of venue. *See Schaffer*, 433 U.S. at 228, n.8 (Brennan, J., dissenting) (and cases cited). But Mr. Rudzewicz did not raise that point in the circuit court.

63. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 186 (1979); *Schaffer*, 433 U.S. at 225 (Brennan, J., dissenting). *Cf. Hanson*, 357 U.S. at 258 (Black, J., with Burton and Brennan, J.J., dissenting). A few lower-court decisions on the point are cited at p. 26 n.44 of the Jurisdictional Statement.

64. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1130 (1966).

the opposite direction." *Schaffer*, 433 U.S. at 26 (Brennan, J., dissenting).

Third, Burger King has an unmistakable interest in litigating in a convenient forum.[65] That interest is not alone sufficient to confer jurisdiction,[66] but a plaintiff's contacts "may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises."[67] As we have argued, this interest is more than mere convenience; it extends to the broader regulatory objective of insuring uniformity and consistency throughout a nationwide system.[68]

Fourth, there is no evidence that Mr. Rudzewicz was significantly burdened by defending in the Florida court. Certainly Mr. Rudzewicz could afford the cost of traveling to Miami to appear. But the question is not one of inconvenience; the question is whether the necessity of defending in Miami somehow hindered Mr. Rudzewicz' effort

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65. *World-Wide Volkswagen*, 444 U.S. at 292, *citing Kulko*, 436 U.S. at 92.

66. *Hanson v. Denckla*, 357 U.S. at 253.

67. *Calder*, 79 L. Ed.2d at 811, *citing McGee*, 355 U.S. 220. *See Keeton*, 79 L. Ed.2d at 801 ("Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum").

68. This Court has said that "efficiency" is an important value from the perspective of a governmental system. *World-Wide Volkswagen*, 444 U.S. at 292. See von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1162-63, 1174 (1966). The same is true of a "legitimate regulatory program," Brilmayer, 1980 Sup. Ct. Rev. at 87, conducted through a private enterprise. It seeks uniformity and predictability. *Cf. M/S Brennan v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14, 17 (1972) (forum clauses create certainty and predictability). The resolution of disputes in a single forum aids that goal.



on the merits.[69] This consideration is relevant,[70] but not significant. Even a light burden will not confer jurisdiction if the contacts are otherwise insufficient.[71] And when the contacts are otherwise sufficient, even if "the impact on outsiders is heavier, it is not discrimination but only the natural consequence of multistate activity."[72]

Nevertheless, we should note that the record contains no evidence that Mr. Rudzewicz was significantly burdened in presenting his defense or counterclaim by the necessity of litigating in Florida. The circuit court's opinion states that the necessity of defending in Florida "severely impaired [Mr. Rudzewicz'] ability to call Michigan witnesses who might be essential to his defense and counterclaim" (J.A. 182). We can find no evidence of record to support this statement.[73] Nor at any time in this litigation has Mr.

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69. *See McGee*, 355 U.S. at 224; *World-Wide Volkswagen*, 444 U.S. at 301 (Brennan, J., dissenting). If the question were one of inconvenience, then Burger King could claim an equal or greater inconvenience of litigating in Michigan. *See* Jurisdictional Statement, p. 27 n.47.

70. *International Shoe*, 326 U.S. at 317. *See Hanson*, 357 U.S. at 259 (Black, J., with Burton and Brennan, J.J., dissenting).

71. *World-Wide Volkswagen*, 444 U.S. at 294; *Hanson v. Denckla*, 357 U.S. at 251.

72. Brilmayer, 1980 Sup. Ct. Rev. at 88. Thus, Professor Brilmayer suggests, the issue is not the reasonableness of the burden, but the reasonableness of the imposition of that burden by the forum—which depends on all the contacts. *Id.* at 85-88.

73. No pre-trial affidavits were submitted on this question. There was one point during the trial when the issue came up—when Mr. Rudzewicz was having trouble authenticating some documents, which might have required somebody from Michigan (*see* Tr. 574-75, 579). The trial court immediately offered the defendants as much time as might be necessary to secure the necessary authentication (Tr. 578, 582), and in that light Burger King stipulated to the authenticity of the documents (Tr. 598-99). This is the only evidence of record about the Michigan witnesses. As we have noted, most of the major players on the issues in litigation were from the Miami office. Indeed, the defendants deposed a number of Burger King employees in Michigan, but did not even transcribe any of those depositions—which is a good indication of their value.

Rudzewicz suggested concretely how his defense was burdened. And finally, in the balance of contacts drawn above, any burden upon Mr. Rudzewicz was warranted by his purposeful availment of the benefits of the forum.

Fifth and finally, reversal of the circuit court's decision will not create the potential for unfairness in other cases. The circuit court was disproportionately concerned about the impact of the district court's order in other contexts—in consumer transactions (J.A. 177), and in "sow-[ing] the seeds of default judgments against franchisees owing smaller debts" (J.A. 178). *See also* J.A. 181. As we have noted, however, the retail consumer cases have nothing to do with this case, and not even a blanket rule concerning franchises would affect their disposition. On the other hand, we do acknowledge that the arguments advanced above would sanction a general rule, or at least a presumption, that participation in an interstate franchise relationship, which is centralized rather than decentralized, should represent a form of consent to the jurisdiction of the franchisor's principal place of business—in return for which the franchisee receives significant economic benefits. Even that rather-qualified generalization, however, should be further qualified by the well-recognized principle that every question of this nature must be answered through the particular facts at hand.[74] There may be franchises that are primarily intrastate in nature. There may be franchises that delegate substantial decisionmaking authority to regional managers—or even to the franchisees. It was the obligation of the circuit court to decide this case, not imaginary cases. Given Mr. Rudzewicz' voluntary submission to the jurisdiction of the Florida court, reversal of the circuit court's opinion in this case will

74. *See Kulko*, 436 U.S. at 92; *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). *See Helicopteros*, 80 L. Ed.2d at 414 (Brennan, J., dissenting).



be an affirmation of constitutional principles—not a threat to small businesses.

On the basis of the foregoing, we respectfully submit that Mr. Rudzewicz purposely solicited the protection and benefits of the forum; was called to answer for conduct growing out of that contact; and defended the suit in circumstances which were not unfair. The clear majority of circuit and district court decisions on this question agree with this conclusion.[75]

B. *Mr. Rudzewicz has Waived any Challenge to the Jurisdiction of the District Court.*

As we have noted, Mr. Rudzewicz expressly compromised and waived his right to appeal the trial court's finding of a trademark infringement under both federal and state law, and the injunctive relief awarded (R. 804). That was necessarily a waiver of any contention that the trial court lacked personal jurisdiction to adjudicate the trademark claims. At the very least, therefore, the circuit court's

75. We have cited several federal cases under statutes analogous to this one at p. 18 n.27 of our Jurisdictional Statement; and several others in which "doing business" statutes were applied under facts analogous to those here (p. 19 n.28). To the cases involving analogous statutes, we would add the following: *Kemper v. Rohrich*, 508 F. Supp. 444 (D. Kan. 1980); *Ammon v. Kaplow*, 468 F. Supp. 1304 (D. Kan. 1979); *Jeno's, Inc. v. Tupman Thurlow Co.*, 349 F. Supp. 1185 (D. Minn. 1972); *Sporcam, Inc. v. Greenman Bros., Inc.*, 340 F. Supp. 1168 (S.D. Iowa 1972). *Cf. Great Western United Corp. v. Kidwell*, 577 F.2d 1259 (5th Cir. 1978); *Strick Corp. v. A. J. F. Warehouse Distributors, Inc.*, 532 F. Supp. 951 (E.D. Pa. 1982); *Alchemie International, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039 (D. N.J. 1981); *Sterling Industrial Corp. v. Telephone, Inc.*, 484 F. Supp. 1294 (W.D. Mich. 1980). To the "doing business" cases, we would add *Quasha v. Shale Development Corp.*, 667 F.2d 483 (5th Cir. 1982); *Austin v. North American Forest Products*, 656 F.2d 1076 (5th Cir. 1981); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303 (8th Cir. 1977); *Southern Investors II v. Commuter Aircraft Corp.*, 520 F. Supp. 212 (M.D. La. 1981); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355 (S.D. Tex. 1978).

opinion must be reversed with instructions to order reinstatement of the injunctive order.

We can think of no logical basis for contending that the arguments for the exercise of personal jurisdiction over the tort claims in this case are significantly stronger than the arguments for the exercise of jurisdiction over the contract claims growing out of the identical transaction.[76] It may be that the foreseeable impact in the forum of the franchisees' trademark infringement was a bit more damaging than its failure to pay money, but in the context of the array of jurisdictional contacts in this case, that one observation can hardly prove dispositive. The franchisees' purposeful availment of the benefits of the forum derived as much from the contractual franchise relationship as from the license agreement. Thus, in conceding and waiving his right to appeal the finding of trademark infringement, and with it of course the jurisdictional basis for that finding, Mr. Rudzewicz necessarily conceded as well that the trial court had jurisdiction over the contract claims. He was free of course to appeal the substantive finding of a contract violation—but he was not free to appeal the assumption of jurisdiction over those claims.

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76. *See Vencedor Manufacturing Co. v. Gougler Industries, Inc.*, 557 F.2d 886, 893 (1st Cir. 1977), *citing* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L. F. 533, 569-70.



## CONCLUSION

Mr. Rudzewicz and his co-franchisee knowingly entered into a long-term interdependent relationship with a national corporation centered in Florida. In so doing, they purposefully invoked the benefits and protection of the forum. Burger King's cause of action grew out of that relationship, and by no standard was it unfair that Mr. Rudzewicz was subjected to the jurisdiction of the Florida courts to answer for conduct which foreseeably caused injury in Florida. Moreover, Mr. Rudzewicz effectively waived any right to challenge the trial court's jurisdiction. The decision of the circuit court should be reversed, and the cause remanded with instructions to affirm the district court's judgment.

Respectfully submitted,

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